United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

76-1049

To be argued by
CHERYL M. SCHWARTZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1049

UNITED STATES OF AMERICA,

Appellee,

—against—

ARTHUR BRECHT,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
CHERYL M. SCHWARTZ,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Arthur Brecht appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered on January 23, 1976, convicting him, after a jury trial, of attempting to obstruct, delay and affect interstate commerce by means of extortion (Count I), in violation of the Hobbs Act, Title 18 U.S.C. § 1951, and of traveling in interstate commerce with intent to promote and attempting to promote the unlawful activities of larceny by extortion and commercial bribe receiving (Counts IV and VI), in violation of Title 18 U.S.C. § 1952 (the "Travel Act").

Appellant was sentenced to concurrent terms of two years incarceration on each count. Execution of the sentence was suspended, and a period of three years probation was imposed.

Appellant presents two claims on appeal. He contends that the New York State crime of commercial bribery [1] is not a proscribed "unlawful activity" within the meaning of the Travel Act. Appellant also contends that the Government failed to prove essential elements of the Hobbs Act violation, those of fear and economic loss to the victim.

Statement of Facts

A. The Government's Case

In December 1974, appellant was the manager of the technical publications group in the Gas Turbine Division of the Power Generation Systems Company of Westinghouse Electric Corporation (30-32).[2] The Gas Turbine division is located in Lester, Pennsylvania, near Philadelphia (29). Appellant had full management responsibility for the production of technical manuals and instruction books explaining the use and care of the gas turbine equipment provided to Westinghouse customers (32-34). The equipment is quite complex, and the customers depend heavily on the manuals (33).

Appellant had discretion to decide whether the manuals would be produced "in house" or by subcontractors (34-A), and his recommendations in this regard were followed 99% of the time (36-37). In addition, for subcontract work, an informal bidding procedure was used, and appellant's selection of a subcontractor always had been approved by Westinghouse (39-40). In 1974, $200,000 to $250,000 worth of work was subcontracted by appellant (41).

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[1] N.Y. Penal Law § 180.05 (McKinney 1975).

[2] Numbers in parenthesis refer to trial transcript pages.

In the latter part of 1974, appellant was responsible for producing manuals as part of a $23,000,000 contract Westinghouse had with El Paso Electric Company, Newman, Texas (41-44). The usual procedure that appellant following was first to prepare a work statement detailing the requirements for the manuals and then to have a bidder's conference with potential subcontractors (38).

Appellant had prepared a work schedule for the El Paso job which called for the awarding of bids in October 1974 and delivery of the books by March 1975 (62-63). There was a great deal of pressure to deliver the books ahead of schedule (64-66).

On October 31, 1974, National Technical Publications ("NTP"), submitted a bid of under $50,000, for the El Paso job (60-61). NTP was a small company owned and operated from his home by one Joseph Racker,[3]

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[3] Mr. Racker died of natural causes on August 23, 1975, and consequently was unavailable to testify at trial (135). Mr. Racker had been arrested in April 1974 on charges involving kickbacks to Grumman Aerospace Corporation employees as inductments for awarding subcontracts to U.S. Electronics Publications, Inc. ("USEP"), of which Racker was president at that time. Racker's relation with USEP was severed in May 1974, and Racker formed NTP in June 1974. In September 1974, Racker was indicted by a grand jury in the Eastern District of New York in a 43-count indictment involving the kickbacks to Grumman employees. In December 1974, the indictment was still pending, and Racker's trial was set before Judge Weinstein for February 1975. On January 8, 1975, Racker agreed to plead guilty to six counts of the indictment and to give the Government truthful cooperation in the investigation of criminal activities involving Department of Defense contracts at Grumman. The Government agreed to inform the Court of the extent and nature of Racker's cooperation prior to sentencing. The agreement did not encompass the charges against the appellant (129-135).

On March 21, 1975, the Court sentenced Racker to a total fine of $60,000 and to a term of imprisonment of two years on each

[Footnote continued on following page]

who was also president of the company (130). NTP was in the business of preparing technical manuals (130).[4]

At some point after NTP had submitted its bid, Brecht met with Racker to discuss the bid, and Brecht asked for a kickback to award Racker the subcontract (GA 2A, 13A).[5] Another meeting was arranged for December 23, 1974. On that day, December 23, Joseph Racker met with his attorney and a private investigator (112). Later that day, after contacting the United States Attorney's office, the investigator wired Racker, pursuant to his consent, with a tape recorder and microphone (119-120) and followed him to the pre-arranged meeting with the appellant at a restaurant on Long Island (122). The appellant had traveled from Pennsylvania to New York for a business conference on that day (GA 1A). Approximately sixty minutes of conversation were recorded, and the tape was later turned over to the FBI (125).

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of the six counts, which was suspended on certain conditions, and Racker was to serve six months in a community rehabilitation center (135). Racker's conviction was subsequently affirmed by this Court (Dkt. 75-1132), on August 11, 1975, without opinion. (Racker, though he pleaded guilty, had preserved his appellate rights).

[4] There is no dispute in this case as to NTP's involvement in interstate commerce. The evidence showed that in 1974, NTP accrued approximately $47,000.00 in income from two contracts from out-of-state firms (165; Government Exhibit 18). NTP incurred over $3,000 of expenses in interstate commerce, including airline travel, long distance telephone calls, payments to out-of-state illustrators and artists, and a liaison office in Florida (166-175; Government Exhibit 27).

[5] We have reproduced in the Government's Appendix ("GA") transcripts of the taped conversations between appellant and Racker. References to pages of the transcript of the December 23, 1974, conversation are designated as "GA-A" and references to the pages of the December 28, 1974, transcript are designated as "GA-B".

The tape revealed that Racker would not get the subcontract from Westinghouse unless he gave appellant Brecht $1000, and that if he did pay the $1000, he would be assured the subcontract by the first week in January 1975 (GA 14A, 25A, 42A). In return for the $1000, Racker would be given Brecht's shares in Ace Publishing Corporation, which Racker believed to be worthless (265). As of that meeting, Brecht had found 215 shares of the stock (GA 35A). The tape also showed that on prior occasions, Brecht had accepted $500 per book for helping another subcontractor fulfill his contract to Westinghouse and had given the subcontractor invoices to cover the payments which were back-dated to the time before Brecht had been a full-time employee at Westinghouse in order to avoid the appearance of conflict of interest (GA 10A-12A). On another occasion, Brecht had used a subcontractor's credit card to pay for his own car repairs (GA 43A-45A). Racker told Brecht that he would pay him the $1000 but did not have the money and would need a few days to arrange it. He told Brecht that he had a "friend" who would agree to buy the stock but would not be available until later in the week (GA 26A-28A). Brecht also told Racker that he expected that between $200-250,000 a year in subcontract work would be given out in 1975 and 1976 by Westinghouse (GA 41A).

Another meeting was arranged for December 28 at the same restaurant. On the morning of December 28, Mr. Racker and his attorney met with two special agents of the FBI at the Garden City Office (184, 191). Mr. Racker consented in writing to record his conversation with Brecht, and a NAGRA body recorder as well as a transmitter were placed on Mr. Racker (184-185). Mr. Racker also had with him a check for $500 and five $100 dollars bills. The agents noted the serial numbers and placed the cash and check in a brown envelope (206-207).

The agents and Mr. Racker then proceeded in separate cars to the restaurant (191). Inside the restaurant, the agents took seats at a table approximately 20 to 25 feet from Mr. Racker (192). Shortly thereafter, Mr. Brecht joined Mr. Racker (192), and six to seven minutes later the defendant and Mr. Racker were observed exchanging envelopes (204). During the course of the meeting, photographs of the defendant and Mr. Racker were taken (Government Exhibit 14). The attempt to monitor the conversation was unsuccessful because of "feedback" by the transmitter (193); however, the NAGRA successfully recorded the conversation. The following occurred.

Mr. Brecht had come up from Pennsylvania on December 28 for the meeting with Mr. Racker (70). During the meeting, Mr. Racker again confirmed the fact that he would have to pay $1000 to get the contract and that the $1000 would assure him of the contract (GA 5B-6B, 15B). Mr. Brecht gave Racker the stock in exchange for the money (GA 6B); Racker was to pay an additional $1500 after the contract was awarded him (GA 7B). Mr. Brecht also complained to Mr. Racker about a company which had not given him any favors, such as taking him to lunch or giving him liquor or cigars, and he wondered how that company "expect[ed] to survive", in a clear attempt to let Mr. Racker know what was expected of him (GA 9B-11B).[6] The defendant, money in hand, promised that he would call Racker during the first week of January 1975 to discuss the details of starting the El Paso job (GA 20B-22B).

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[6] Frank Robbins, Brecht's supervisor at Westinghouse, testified that Westinghouse had a policy concerning employees working as consultants for outside firms and concerning gifts from companies Westinghouse did business with. The policy was that working as a consultant was not to be done (70) and nothing of appreciable value was to be accepted from outside firms (78).

At the end of the meeting, the defendant left the restaurant and was arrested by the FBI agents (193). A search of the defendant revealed the brown envelope containing the check and five hundred dollars in cash which the agents had seen earlier that morning (194, 204-207).

Mr. Racker returned to the Garden City Office of the FBI (194), where he gave the agents the sealed white envelope the defendant had given him at the meeting (205-206). Inside the envelope were five stock certificates totalling 215 shares of the Ace Publishing Corporation and the corresponding stock powers (206).

B. The Defense Case

The defendant did not testify and no witnesses were called on his behalf.[7] On summation and during cross-examination, however, the defendant maintained that the transaction with Mr. Racker was an arms-length transaction, a bona fide sale of stock to a willing buyer. However, John McGary, the financial vice president of Charter Communications, Inc., formerly Ace Publishing Company (209), testified that in December 1974, in his opinion, the stock would be fairly valued at ten to fifty cents a share (214). His opinion was based upon these circumstances: (1) Ace/Charter stock is not publicly traded; (2) no dividends have been paid; (3) the stock is held by a small group of individuals, numbering about 275, and there is only a limited market for the stock; and (4) in 1974 Charter lost $1.3 million and was expected to lose $1 million in 1975 (210-218). Mr. McGary did testify that a company stock option plan offered the stock

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[7] The implication in the transcripts of the taped conversations that it was Mr. Brecht's superiors who were demanding the kickback was not pursued as a defense.

at $4.50 per share (222-223), but he further testified that this option price would not be determinative of the price paid in a sale between individuals (226). Furthermore, Special Agent Daniel Kelleher testified that on the morning of December 28, just prior to the second meeting with the defendant, Mr. Racker had stated that Brecht was asking $1000 up front and a total of $2500, or 5% of the total contract price, as a "kickback" and that the Ace Publishing stock was worthless (265).

At the close of the government's case, the defendant asked for a judgment of acquittal based on the assertions (1) that the government had not established a course of extortion or bribery and that such a course of conduct is a necessary element of the Travel Act, (2) that the Travel Act was aimed at organized crime and not at individuals, (3) that the case was one more properly prosecuted in state court than federal court, (4) that the use of the term "bribery" as indicated in *United States* v. *Niedelman*, 356 F. Supp. 979 (S.D.N.Y. 1973) requires that the Travel Act counts be dismissed (the record does not show any discussion of the *Niedelman* holding by the defendant), and (5) that the inability of the defendant to confront Joseph Racker denied him of due process. The Court denied the defendant's motion (282-287).

ARGUMENT

POINT I

The New York State crime of commercial bribe receiving is an unlawful activity within the scope of the Travel Act.

Appellant argues that the unlawful activity of bribery, which is proscribed by Title 18, U.S.C. § 1952(b)(2), is limited to the common law meaning of bribery, and therefore only applies to bribery of public officials and was not meant to include commercial bribery, which governs the same conduct in the private sector. Appellant also argues that it is unfair to base a federal felony prosecution on a crime which is only a misdemeanor in the state.

Appellant relies heavily on the legislative history of the Travel Act to support his position. In essence, he argues that the Travel Act was aimed primarily at organized crime figures[8] and was designed to encompass only criminal acts which are the usual tools of organized crime, including corruption of public officials.

This argument has been considered and rejected by the Court of Appeals for the Fourth Circuit in *United States* v. *Pomponio*, 511 F.2d 953 (4th Cir. 1975). In *Pomponio*, the court followed the reasoning of the Supreme Court in *United States* v. *Nardello*, 393 U.S. 286 (1969) which declined to limit the term "extortion" in the Travel Act to its common law meaning of corrupt acts by a public official:

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[8] Cf. *United States* v. *Phillips*, 433 F.2d 1364, 1367-68 (8th Cir. 1970), *cert. denied*, 401 U.S. 919 (1971) holding that § 1952 encompasses extortion by individuals as well as by syndicate organizations.

> Appellees suggest, however, that Congress intended that the common-law meaning of extortion—corrupt acts by a public official—be retained. If Congress so intended, then § 1952 would cover extortionate acts only when the extortionist was also a public official. Not only would such a construction conflict with the congressional desire to curb the activities of organized crime rather than merely organized criminals who were also public officials, but also § 1952 imposes penalties upon any individual crossing state lines or using interstate facilities for any of the statutorily enumerated offenses. The language of the Travel Act, 'whoever' crosses state lines or uses interstate facilities, includes private persons as well as public officials. *United States* v. *Nardello*, *supra*, 393 U.S. at 292-293.

The *Nardello* decision stated that "prosecutions under the Travel Act for extortionate offenses involving only private individuals have been consistently maintained" and refused to adopt a narrow interpretation of "extortion", preferring to use "extortion" as a generic term. *United States* v. *Nardello*, *supra*, 393 U.S. at 295. Similarly, the Court of Appeals in *Pomponio* expressly concluded that the New York crime of commercial bribery fell within the generic term "bribery" as used in the Travel Act and upheld the conviction.

The interpretation of the Supreme Court in *Nardello* that § 1952 is aimed at *any* individual crossing state lines for *any* of the statutorily enumerated offenses applies equally to bribery as to extortion. Appellant's contention that the *Nardello* rationale does not apply to bribery because a briber can be anyone not just a public official (Appellant's brief p. 18) is simply unconvincing in light of the language in *Nardello* respecting extortion.

Appellant, however, cites *United States* v. *Niedelman*, 356 F. Supp. 979 (S.D.N.Y. 1973) as authority for the proposition that commercial bribery is not included in § 1952 and requires reversal of the Travel Act convictions. Yet the court in *Niedelman* states that four unreported decisions [9] in the Southern District of New York have rejected similar contentions. *United States* v. *Niedelman*, *supra*, 356 F. Supp. at 981. Clearly the weight of authority is against appellant.

Moreover, this Court has already refused to whittle away congressional efforts to cope with the detrimental effects of bribery in the private sector despite the obvious non-uniformity which necessarily results from federal enforcement. In deciding whether bribery of a participant in an amateur sport constitutes a crime of moral turpitude within the meaning of the Immigration Act of 1917, this Court addressed the issue of non-uniformity among the states:

> It is . . . equally heinous to subvert the integrity of an amateur athlete as it is to corrupt the loyalty of employee to employer or the loyalty of a public servant to the people. . . . That the criminal law dealt with the bribery of public officials and even employees long before it proscribed the bribery of amateur athletes and that some jurisdictions still do not have a statute analogous to § 382(1) [bribery of amateur athletes], does not show that the conduct proscribed therein is not immoral but simply that only recently has it seemed necessary to make such conduct criminal. *United States* v. *Esperdy*, 285 F.2d 341, 342-343 (2d Cir.), *cert. denied*, 366 U.S. 905 (1962).

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[9] *United States* v. *Maiolo* (72 Cr. 1123), Frankel, *J.*; *United States* v. *Endresen* (73 Cr. 85), Lasker, *J.*; *United States* v. *Hohn* (72 Cr. 1124), Lasker, *J.*; *United States* v. *Callahan* (72 Cr. 1126), Frankel, *J.*

Similarly, the contention that it is unfair to convert a state misdemeanor into a federal felony was dismissed out of hand in another Travel Act case before this Court. *United States* v. *Brennan*, 394 F.2d 151, 153 (2d Cir.), *cert. denied*, 393 U.S. 839 (1968). Reference to state law is only necessary to identify the type of unlawful activity proscribed, and the federal offense is the use of interstate facilities with intent to promote this unlawful activity. *United States* v. *Karigiannis*, 430 F.2d 148, 150 (7th Cir.), *cert. denied*, 400 U.S. 904 (1970).

Finally, appellant argues that since the jurors were given alternate theories of guilt for the Travel Act counts, that is, extortion and commercial bribe receiving, if commercial bribe receiving is not an unlawful activity within the meaning of the Travel Act, then the convictions must be reversed. Appellant bases this contention on *United States* v. *Rodriguez*, 465 F.2d 5, 10 (2d Cir. 1972) and *Leary* v. *United States*, 395 U.S. 6, 31 (1969).

Assuming *arguendo* that extortion and bribery are mutually exclusive offenses and therefore represent alternate theories of guilt,[10] based upon our reading of *Leary* and *Rodriguez* and this Court's recent decisions in *United States* v. *Bonacorsa*, — F.2d — (2d Cir., slip op., p. 1451, decided January 9, 1976) and *United States* v. *Natelli*, 527 F.2d 311 (2d Cir. 1975), we believe that appellant's reliance on the *Rodriguez* and *Leary* cases is wholly misplaced. In *Leary* and *Rodriguez*, the Courts held that the unconstitutionality of any of the theories submitted to the jury required reversal. In the instant case, appellant raises no question of constitutional dimension; rather his argu-

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[10] See *United States* v. *Addonizio*, 451 F.2d 49, 77, n.35 (3d Cir 1972), *cert. denied*, 405 U.S. 736 (1972), which indicates that New York State has eliminated the exclusivity of those offenses.

ment is one of statutory construction. *Bonacorsa* and *Natelli* require that a request to the Court to withdraw from the jury's consideration one of two specifications in a single count on the ground of insufficient proof must be made in order to preserve the issue for appellate review. In the instant case, appellant made no such request; he merely asked for a judgment of acquittal, citing *United States* v. *Niedleman*, *supra*, without explanation of the grounds for his motion.

In any event, in the instant case, the jury convicted appellant of violating the Hobbs Act by means of extortion (Count I of the indictment). Since the jury clearly made a finding of extortion under the Hobbs Act, which draws its definition of that term from New York State law, it is clear that the jury's verdict included a finding of extortion on the Travel Act counts, which were based on the New York State extortion statute. Reversal would therefore not be required even if commercial bribe receiving were not a proscribed activity of the Travel Act. *United States* v. *Natelli*, *supra*, 527 F.2d 311 (2d Cir. 1975).

Appellant argues that the standards of proof are different for the federal and state crimes of extortion; the federal crime requires only the wrongful use of fear to obtain property, but the state crime [11] defines extortion as instilling a fear that the actor will perform an act which would not materially benefit the actor but would harm another person. In the instant case, the wrongful use of fear was the threat to give the subcontract to another company, an act which by its nature would not benefit the defendant but would materially harm the target of the threat. The facts therefore prove an extortion under both the Hobbs Act and the New York State penal law.

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[11] N.Y. Penal Law, § 155.05 (McKinney 1975).

Appellant has failed to state either a legal or factual ground requiring reversal of the Travel Act convictions.

POINT II

The Government proved both fear and "economic loss" within the meaning of the Hobbs Act.

Appellant argues that the Government's proof of a violation of the Hobbs Act was insufficient in that although defendant was charged with attempting to obtain money through the use of fear of economic loss, no such economic loss was shown. Appellant contends that the victim of an extortion must be threatened with the loss of property already belong to him and since Racker had no vested right in the El Paso subcontract, he would not have suffered any actual loss to his property had he not been given the subcontract.

In *United States* v. *Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970), the Government's case was based on the defendant's attempts to force the victim, a rubbish collector, to cease competition for the rubbish collecting accounts and to consent to stop soliciting any further business in defendant's area. The defendant, on appeal, argued that the rights to do business and to solicit business are not "property" within the meaning of the Hobbs Act. The Court rejected this contention, stating:

> The concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things (cites), but includes, in a broad sense, any valuable right considered as a source or element of wealth. . . . *United States* v. *Tropiano*, *supra*, 518 F.2d at 1075.

The court further stated that the right to pursue a lawful business, including the solicitation of customers necessary to conduct the business, is a well established property right that comes within the protection of the Fifth and Fourteenth Amendments, and that consequently the right to solicit business constitutes property within the Hobbs Act definition. Although the court was discussing "property" in relation to the "obtaining property" clause of the Hobbs Act and not in the context of economic loss, it is nonetheless clear that the court recognized the rights to do business and solicit business as vested rights or as property which could be lost.

In the instant case, the evidence established that Joseph Racker was attempting to do business by soliciting a subcontract from Westinghouse.[12] Appellant's threat that Racker would not get the subcontract unless he paid a kickback was an interference with Racker's right to solicit business.

In any event, appellant's insistence that the economic loss suffered must be the loss of a vested right is misplaced.[13] Appellant relies solely on the case of *United*

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[12] The evidence must be viewed in the light most favorable to the Government. *United States* v. *Castellana*, 349 F.2d 264, 267 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966). All permissible inferences are to be construed in the Government's favor. *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965); *United States* v. *Dardi*, 330 F.2d 316, 325 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

[13] Cf. *United States* v. *Pranno*, 385 F.2d 387 (7th Cir. 1967), *cert. denied*, 390 U.S. 944 (1967), in which a payment was made to get a building permit, and *United States* v. *Sopher*, 362 F.2d 523 (7th Cir. 1966), which involved a payment for an award of a bid on a subcontract.

States v. *Kubacki*, 232 F. Supp. 638 (E.D. Pa. 1965), to establish this requirement. However, even the Court in *Kubacki* is cognizant of the fact that the loss might be that of a *privilege* rather than a *right*. *United States* v. *Kubacki*, *supra*, 237 F. Supp. at 641. Nor does the court's decision in *Kubacki* take into account the holding in *Tropiano*. Moreover, in *United States* v. *Addonizio*, *supra*, 451 F.2d at 73 (3d Cir. 1972), a similar argument, that economic loss must consist of then-existing contract rights rather than future contract rights, was rejected. The Court recognized that economic loss is not limited to contract rights but includes the "financial benefit of their efficiency and industry" when businessmen submit the lowest bids.

Appellant further argues that the Government failed to establish fear. He argues that the facts establish complicity in a bribe scheme, and that, as in *Kubacki*, there was no fear on the part of Joseph Racker, only the "disappointment over the failure to obtain a new piece of business." (Appellant's Supplemental Brief, p. 7.) In *Kubacki*, the court found that the payers of the kickback were willing participants in the scheme and consequently there was no fear on their part within the meaning of the Hobbs Act. *United States* v. *Kubacki*, *supra*, 232 F. Supp. at 642.

The facts in the instant case clearly establish coercion and duress applied by the appellant to Joseph Racker, the victim. If Mr. Racker had been a willing participant in a scheme to obtain undue influence, i.e. a bribery scheme, he would not have consulted with his lawyer and a private investigator, notified the United States Attorney of the extortion attempt, and cooperated with the Federal Bureau of Investigation (112, 119, 184). Moreover, Mr.

Racker's own words in the taped conversations reveal his state of mind to be that of coercion or duress:

Racker: By me (sic), you me shocked that other day when this whole thing came up because (GA 13A).

. . .

Racker: And you mean they wouldn't give me that contract unless I did this, right.

Brecht: That's it, you know, that's it.

Racker: Well, if I gave it to you, I get the contract the first of the year.

Brecht: Right. (GA 14A)

. . .

Racker: Well, I don't know what the hell this business is going to, I mean (GA 15A).

. . .

Racker: I have to pay $1,000 to get a job (Inaudible). It upsets me frankly, I know it upsets you too. (GA 15B)

Finally, appellant's comments that appellant's conduct is clearly punishable under New York State law and so he should not be prosecuted by the Government simply ignores the very real federal interest in this case, that of protecting interstate commerce from obstruction, delay or other undesirable effects. The Government demonstrated at trial that the appellant's conduct had the effect of interfering with interstate commerce by depleting NTP's meager resources and by causing a delay of the shipment of the technical manuals to El Paso, in a situation where Westinghouse was under pressure to ship them as quickly as possible. The Government has an interest in prosecuting appellant wholly separate from any state interest. Clearly the evidence established both

coercion and thus fear as well as economic loss within the meaning of the Hobbs Act.[14]

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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[14] The evidence of coercion was so strong that Judge Weinstein commented at a sidebar conference, "It is a clear as can be. There is a straightforward demand and his statement on the record indicates that he wants to pay it because he is coerced" (139).

* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Armand D. Budish in the preparation of this brief. Mr. Budish is a second year law student at New York University School of Law.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 12th day of April, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William J. Gallagher, Esq.
Legal Aid Society
Fed. Defender Services Unit
509 U.S. Courthouse
Foley Square
New York, New York 10007

Evelyn Cohen

Sworn to before me this
12th day of Apr. 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
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